

IP 05-0255-M 1 F US v Morgan
Magistrate Kennard P. Foster

Signed on 7/5/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT W. MORGAN,

Defendant.

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CAUSE NO. IP 05-0255M-01

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 05-0255M-01
ROBERT W. MORGAN,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

ROBERT MORGAN is charged in a complaint that was issued on June 24, 2005, with the unlawful possession of firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1). On June 24, 2005, at the initial appearance, the government moved for detention pursuant to 18 U.S.C. §§ 3142 (f)(1)(A) and (f)(1)(D) on the grounds that: (1) this case involves a crime of violence; and (2) Defendant has been convicted of two qualifying offenses.

A detention hearing was held on June 28, 2005. The United States appeared by Assistant United States Attorney James P. Hanlon. ROBERT MORGAN appeared in person and by his counsel, William Dazey. The Court found bases for a detention hearing pursuant to 18 U.S.C. §§ 3142 (f)(1)(A) and (f)(1)(D). The government established by clear and convincing evidence, predicated upon the facts precipitating Defendant's arrest on June 24, 2005, and his criminal history and record, that no condition or combination of conditions will reasonably assure the safety of the community if he is released. The government also established by a preponderance of the evidence that there is no condition or combination of

conditions that would reasonably assure Defendant's appearance. The Court ordered that Defendant be detained.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1. ROBERT MORGAN is charged by a criminal complaint that was issued on June 24, 2005. The complaint is supported by the Affidavit of Jason Tortorici, a Special Agent with the United States Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATFE"). The complaint charges Defendant with possession of firearms by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

2. The maximum penalties for violating 18 U.S.C. § 922(g)(1) include 10 years' incarceration, 3 years of supervised release, and a fine of \$250,000.

3. Defendant waived his right to preliminary examination and was held to answer.

4. The Court takes judicial notice of the complaint and the Affidavit In Support of the Complaint. The Court further incorporates the evidence admitted during the detention hearing, as if set forth herein.

5. The government submitted the matter of detention on the complaint, the affidavit, and the testimony of SA Tortorici. Counsel for Defendant cross-examined SA Tortorici. Defendant testified on his own behalf.

6. The Court admitted as Exhibit 1 the Pre-Trial Services Report prepared by the U.S. Probation Office on the issue of Defendant's release or detention. Neither party objected to the admission of Exhibit 1.

7. Exhibit 1 demonstrate Defendant's criminal history to include multiple prior felony convictions, including multiple convictions for burglary and controlled substance offenses.

8. The credible evidence presented by the government at the hearing established that, in addition to the firearms listed in the affidavit in support of the complaint, law enforcement officers recovered ammunition from Defendant's residence on June 23, 2005. There were various types of ammunition, including 7.62 x 39 mm ammunition that could be fired by the MAK-90 rifle referenced in the affidavit that had been converted to fire fully automatic. One of the shotguns referenced in the affidavit was loaded.

9. Defendant testified that despite his familiarity with the Gun Control Act of 1968 and extensive experience with the criminal justice system, he did not know that he was not permitted to possess firearms in or affecting interstate commerce. Defendant testified that he had acquired the firearms recovered from his residence within the last several years.

Defendant admitted that he has other firearms in addition to those that were seized pursuant to the search warrant. Defendant testified that he used these weapons solely for hunting and sporting purposes and that he endeavored to keep weapons out of the hands of individuals who might use them to do harm. On cross-examination, Defendant denied that he offered to sell firearms to anybody.

On rebuttal, SA Tortorici testified that a reliable and credible informant had told officers of the Greenfield Police Department that Morgan offered to sell him firearms during the week of June 20, 2005. During this conversation, Morgan told the informant that he could get him a rifle, a shotgun, or a pistol. When the informant replied that he needed more firepower, Morgan told him that he could get him whatever he needed.

10. Defendant qualifies for a detention hearing upon the government's motion that this case involves a crime of violence. 18 U.S.C. § 3142(f)(1)(A). Although possession of a firearm by a convicted felon is not a crime of violence *per se*, this case involves a crime of violence within the definition of 18 U.S.C. § 3156(a)(4) and thus triggers a detention hearing under 18 U.S.C. § 3142(f)(1)(A). As this Court has previously held, *United States v. Lane*, 252 F.3d 905 (7th Cir. 2001), is not controlling in a case with a dramatically different procedural posture. In *Lane*, the issue was whether the defendant, who had been convicted of the unlawful possession of a firearm by a convicted felon, should have been released pending appeal. Here, the issue is whether Defendant, who has been charged with the unlawful possession of firearms by a convicted felon, should be released *pending trial*.

Moreover, in this case, Defendant possessed a 7.62 x 39mm rifle that was capable of firing in a fully automatic mode, which is also a violation of 26 U.S.C. § 5861(d). A weapon of this type has no significant lawful use and its possession by a convicted felon constitutes a crime of violence. See *United States v. Lane*, 252 F.3d 905, 907 (7th Cir. 2001); *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir. 2001). While recognizing the obligation to follow Circuit precedent under the principle of *stare decisis*, *Lane* is not controlling here because it did not address the precise issue presented by this case, *i.e.*, whether the offense of unlawful possession of a fully automatic firearm by a convicted felon may constitute a crime of violence based on the individual facts and circumstances of the particular case. The case specific, facts and circumstances intensive approach taken by the court in *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000), is applicable here. See also *United States v. Powers*, 2004 WL 1109902 (W.D. Va. April 16, 2004). The Court thus finds the reasoning set forth in *Dillard*—which is

consistent with this Court's reasoning in *United States v. Sloan*, 820 F. Supp. 1133 (S.D. Ind. 1993)—persuasive.

11. Defendant qualifies for a detention hearing upon the government's motion that Defendant has previously been convicted of at least two qualifying offenses. *See* 18 U.S.C. § 3142 (f)(1)(D) & 3156(a)(4).

12. The evidence relevant to the factors set forth in 18 U.S.C. § 3142(g) requires that Defendant be detained as there is no condition or combination of conditions of release sufficient to reasonably assure that he will not engage in dangerous criminal activity pending trial. Therefore, Defendant is ORDERED DETAINED.

13. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or

attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. *See* 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See also United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§ 3142(f)(1)(A), (f)(1)(D), and (f)(2)(A). The Court has found that the government satisfied its burden of establishing that all of these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. *See* 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *See United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *See United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

14. The Court further considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

15. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. For the reasons set forth *supra*, this case involves a crime of violence.
- b. Defendant has had persistent and continuous contacts with law enforcement.

In light of the number and nature of these contacts, Defendant has established a pattern of disregarding the law. If released, he will not follow the law or the conditions of pre-trial release.

- c. The evidence presented demonstrates a high probability that Defendant will be convicted of the charged offense.

- d. Defendant has a history of drug abuse, drug related offenses, and tested positive for marijuana after his initial appearance.

- e. Defendant presents a serious risk to the community. Defendant's criminal history is lengthy and serious. Defendant possessed a fully automatic MAK-90, an extremely dangerous weapon. Based on the evidence before the Court, it is likely that Defendant, in fact, did offer to sell firearms to the informant. Based on the evidence that Defendant obtained the firearms involved in this offense within the last several years, it is clear that he knows how to obtain firearms illegally. Although the name of the informant was not revealed to Defendant, it is likely that he knows the identity of this individual. Defendant therefore presents a serious risk to the informant in addition to the community in general.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that the Defendant clearly and convincingly is a danger to the community.

WHEREFORE, ROBERT MORGAN is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with a Court proceeding.

Dated this ____ day of July, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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U. S. Marshal Service